identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

DATE: FEB 28 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director), and certified for review to the Chief, Administrative Appeals Office (AAO). The AAO will affirm the Director's decision and deny the petition.

The petitioner is a non-profit think tank. It seeks to employ the beneficiary permanently in the United States as a "Think Tank Entrepreneur" and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL).

In a decision dated October 3, 2011, the Director denied the petition on the grounds that the petitioner failed to demonstrate that the beneficiary has the minimum educational degree and work experience specified on the labor certification. In particular, the Director found that the beneficiary does not have a U.S. master's degree and the evidence of record does not establish that the beneficiary has at least 36 months of experience in the job offered. The Director certified his decision for review to the AAO.

Certifications by field office or service center directors may be made to the AAO "when the case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulations further state, in pertinent part, as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." 8 C.F.R. § 103.4(a)(4). "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5). The AAO conducts its review on a *de novo* basis, before issuing a decision. *See* Soltane v. DOJ, 361 F.3d 1143 (3d Cir. 2004).

Job Requirements and Beneficiary's Qualifications

To be eligible for approval as an advanced degree professional, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[1] In this case, the priority date is November 1, 2010.

The key to determining the job qualifications is found on ETA Form 9089, Part H. This section of the labor certification describes the terms and conditions of the proffered position. It is important that the ETA Form 9089 be read as a whole.

[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

When determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

For the "think tank entrepreneur" at issue in this proceeding, the pertinent educational and experience requirements specified in the ETA Form 9089, Part H, are as follows:

> Line 4 states that a master's degree is the minimum level of education required.
>
> Line 4-B specifies "economics, political science, or a related field" as the major field of study.
>
> Line 6 states that 36 months (three years) of "experience in the job offered" is required.
>
> Line 8 specifies that no alternative combination of education or experience is acceptable.
>
> Line 9 states that no "foreign educational equivalent" is acceptable.

In Part J of the ETA Form 9089 the beneficiary stated that his highest level of education relevant to the proffered position is a doctorate in economics from Roskilde University in Roskilde, Denmark, completed in 2000. As evidence of this educational credential, the record includes a copy of an English language document from Roskilde University, dated April 7, 2000, awarding a "Ph.D. Degree" to the beneficiary "in recognition of scientific attainments in Social Sciences as demonstrated by the thesis entitled *Uncertainty, Macroeconomic Stability and the Welfare State*."

At Part J, line 21 the beneficiary answered "not applicable" to the question of whether he gained any of his qualifying work experience in a substantially comparable position with the employer.

In Part K of the ETA Form 9089 the beneficiary listed his work experience as follows:

- September 1, 2002 – May 31, 2005: Assistant Professor of Economics at Skidmore College in Saratoga Springs, New York.

- November 1, 2005 – November 30, 2007: Research Consultant (self-employed) [redacted]
- May 12, 2008 to April 30, 2009: [redacted] Research for South Carolina Policy Council [redacted]
- March 30, 2009 to present: "Think Tank Educator/Policy" for the petitioner [redacted]

In response to a Request for Evidence issued by the Director, the beneficiary provided a detailed list of his jobs as a self-employed research consultant from November 2005 to February 2008, without explaining why they were not listed in the labor certification. As listed by the beneficiary, his jobs during this time frame included the following:

- November 2005 to January 2006: Research project for American Institute for Economic Research [redacted]
- February 2006 to October 2006: Research for Center for Freedom and Prosperity [redacted]
- October 2006 to April 2007: Research for John William Pope Civitas Institute [redacted]
- June 2007 to October 2007: Research for the Sutherland Institute [redacted]
- November 2007 to February 2008: Consultant for The Saratoga Freedom Institute [redacted]

The evidence of record covers some, but not all, of the claimed employment. It includes the following documentation from former employers:

- A letter from the president of the Center for Freedom & Prosperity Foundation, dated August 8, 2011, describing the beneficiary's work as [redacted]
- A letter from the president of the Sutherland Institute, dated August 2, 2011, describing the beneficiary's work as [redacted]
- A letter from the director of research of the South Carolina Policy Council, dated March 9, 2011, describing the beneficiary's work [redacted]
  The author also stated that he was a research fellow at the Civitas Institute and supervised

the beneficiary's work there as a research consultant from October 2006 through April 2007.

- An undated letter from the president of the South Carolina Policy Council confirming the information from [redacted]

There are no letters, or other evidentiary items, documenting the beneficiary's alleged employment [redacted] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Director's Decision

In his Decision, dated October 3, 2011, the Director found that the beneficiary did not meet the minimum educational or experience requirements for the proffered position. With respect to the educational requirement, the Director agreed with counsel's argument that by checking the box at Part H, line 4 the ETA Form 9089, designating a master's degree as the minimum educational requirement for the job, the employer did not state that this credential had to be a U.S. degree. However, the Director also observed that by checking the subsequent box at Part H, line 9 that a "foreign educational alternative" was not acceptable, the employer did limit the minimum educational requirement to a U.S. master's degree. The Director next addressed counsel's argument that the beneficiary's doctoral degree from Roskilde University exceeded the minimum requirement of a master's degree in Part H, line 4 of the ETA Form 9089, and therefore was not subject to the no foreign equivalency designation of Part H, line 9. The Director rejected this position, ruling that since the labor certification requires at a minimum a U.S. master's degree (based on the employer's entries on lines 4 and 9 of Part H), a higher foreign degree does not qualify the beneficiary for the proffered position because, although it satisfies the "master's" requirement, it does not satisfy the "U.S." requirement. As for the experience requirement on the labor certification, the Director noted that the maximum amount of work experience amassed by the beneficiary in the jobs documented by letters from former employers is 30.5 months. Thus, the evidence of record did not show that the beneficiary met the minimum requirement of 36 months (3 years) of "experience in the job offered" prior to starting work with the petitioner, as specified on the ETA Form 9089.

In his Notice of Certification, also dated October 3, 2011, advising the petitioner that its case was being certified for review to the AAO, the petitioner was given 30 days to submit a brief or other written statement for consideration. No such submission was received from the petitioner. Accordingly, the AAO's review is based on the evidence of record at the time of the Director's decision.

After review of the entire record, the AAO agrees with the Director's determinations that the beneficiary does not meet either the educational or the experience requirements of the labor certification.

Educational Requirement

The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS [Immigration and Naturalization Service] under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

Id. at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

Section 203(b)(2) of the Act provides for the granting of employment-based immigrant visas "to qualified immigrants who are members of the professions holding *advanced degrees or their equivalent* (emphasis added) . . ."

While the phraseology – "advanced degrees or their equivalent" – is not precisely defined in the statute, its meaning is clear in the implementing regulation at 8 C.F.R. § 204.5(k)(2), which defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Thus, "advanced degree" means a U.S. doctorate, master's, or baccalaureate (plus five years of progressive experience in the specialty), or a foreign equivalent degree.

Given the regulatory language above, which was crafted to implement the statutory language at section 203(b)(2) of the Act, the AAO determines that the meaning of the labor certification language at issue in this case – Part H, line 4, in conjunction with line 9, of ETA Form 9089 – is also clear. As previously discussed, the labor certification must be interpreted as a whole. USCIS may neither ignore a term of the labor certification, nor impose additional requirements. *See Madany v. Smith*. Since line 9 of Part H asks whether a "foreign educational equivalent" is acceptable, the only logical interpretation of the minimum educational requirements on line 4 is that the options listed there – including High School, Associate's, Bachelor's, Master's, and Doctorate – refer to U.S. educational credentials.

Accordingly, the AAO rejects counsel's argument that the employer, in checking the master's degree box on line 4, Part H, of the labor certification, did not mean to state that it must be a U.S. degree. When viewing the labor certification as a whole – including line 9 on which the employer indicated that no foreign educational equivalent was acceptable – it is clear that the minimum educational requirement for the proffered position – by the terms and plain language of the ETA Form 9089 – is a U.S. master's degree.

Even if the minimum educational requirement for the proffered position is a U.S. master's degree, counsel asserts that the beneficiary's foreign degree is not disqualifying because it is superior to a master's degree. Consistent with his claim that checking the master's degree box on line 4, Part H did not mean that the employer was requiring a U.S. degree, counsel claims that the beneficiary's doctoral degree from Roskilde University in Denmark, higher than the requisite master's degree, fully complies with the terms of the ETA Form 9089 because the labor certification does not exclude foreign degrees. The AAO does not agree.

In accord with the Director's decision, the AAO determines that the terms of the labor certification – in particular, lines 4 and 9 of Part H, read as a whole – specify that the minimum educational requirement for the proffered position is a U.S. master's degree (line 4) and no foreign educational equivalent (line 9). Thus, an educational credential must meet two conditions to satisfy the minimum requirement of the ETA Form 9089: It must be at least a master's degree, and it must be a U.S. degree. While the doctoral degree the beneficiary claims from Roskilde University may meet the first condition, it does not meet the second condition because it is not a U.S. degree.

Since the beneficiary does not have the requisite education for the proffered position, as specified in the labor certification, the petition cannot be approved.

Beyond the decision of the Director, the AAO is not persuaded by the evidence of record that the beneficiary has the doctoral degree he claims from Roskilde University. No Danish-language version of the degree has been submitted, and the English-language document bears no evidence of being a certified translation of a Danish-language original, in accordance with the regulatory requirement at 8 C.F.R. § 103.2(b)(3). The petitioner has provided no explanation for this evidentiary gap. Moreover, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) provides that a petition for an advanced degree professional "must be accompanied by an official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." No "official academic record" – such as a transcript of the beneficiary's coursework at Roskilde University – has been submitted in this case. As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici.* In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan.*

Experience Requirement

The regulation at 8 C.F.R. § 204.5(g)(1) states that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien . . . ." The record includes letters from three former employers of the beneficiary (one employer submitted two letters) which comply with the substantive requirements of 8 C.F.R. § 204.5(g)(1) and state that the beneficiary worked for them in the following time periods: (1) Center for Freedom & Prosperity Foundation – February through October 2006, (2) Sutherland Institute – June through October 2007, (3) South Carolina Policy Council – May 15, 2008 through January 2009. The author of the first letter from the South Carolina Policy Council stated that he also supervised the beneficiary when the latter worked for the Civitas Institute from October 2006 through April 2007. The referenced employment with the Civitas Institute does not comply with 8 C.F.R. § 204.5(g)(1) since there is no letter in the record from the employer itself.

The AAO fundamentally agrees with the Director's analysis of the beneficiary's experience. In fact, the Director was quite generous in calculating the number of months the beneficiary worked for the

previous employers that are documented in the record. In most of these cases the record is imprecise as to exactly how long the previous jobs lasted. In both the ETA Form 9089 and the letters from former employers, starting and ending months are usually indicated rather than starting and ending dates. In every case the Director gave the beneficiary credit for a full month of employment for each month designated as a starting and ending month – which could have added a half year or more to the beneficiary's actual time of employment. In addition, the Director gave the beneficiary credit for seven months of work at the Civitas Institute despite the fact that no letter was submitted from that employer. Even after granting him every benefit of the doubt based on the evidence of record, the Director calculated the beneficiary's prior employment as nearly half a year short of the three years required in the labor certification. If the undocumented work at the Civitas Institute is subtracted from the beneficiary's ledger, his qualifying experience with the three other employers falls to less than two years.

Thus, the petitioner has not established that the beneficiary had three years of "experience in the job offered" at the time he began working for the petitioner, as required in the labor certification. For this reason as well, the petition cannot be approved.

Conclusion

Based on the foregoing analysis of the record, the AAO will affirm the Director's decision of October 3, 2011. The petition will be denied for failure of the petitioner to establish that the beneficiary meets either the educational or the experience requirements specified in the labor certification, with each of these grounds considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The decision certified to the AAO is affirmed. The petition is denied.